

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

**BEFORE THE CHIEF PROCUREMENT  
OFFICER FOR CONSTRUCTION**

**IN THE MATTER OF:**

**DETERMINATION**

**TYLER CONSTRUCTION GROUP, INC.**

**CASE NO. 2008-0017**

**V.**

**UNIVERSITY OF SOUTH CAROLINA**

**POSTING DATE: MAY 27, 2008**

**BYRNES 4<sup>th</sup> FLOOR RENOVATION  
USC PROJECT CP000238411**

This matter came before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Tyler Construction Group, Inc., under the provisions §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review on the Byrnes 4<sup>th</sup> Floor Renovation bid (“the Project”) for the University of South Carolina (USC). Tyler protests USC’s posting of a Notice of Intent to Award a contract to Monroe Construction Company. [A copy of this protest is attached as Exhibit “A”]. Pursuant to S.C. Code Ann. §11-35-4210(3) (Supp. 2006), the CPOC conducted an administrative review without a hearing. This decision is based on that review and the applicable law and precedents.

#### **FINDINGS OF FACT**

On April 17, 2008, USC advertised for bids on the project. The Bid Form required bidders to submit bids on a base bid and one bid alternate. This alternate was an add alternate. The Supplemental Instructions to Bidders (Form 00201-OSE) included in the Bidding Documents required that in cases where bid alternates are included, the award shall be made to the responsive and responsible bidder submitting the lowest bid for the base and all alternates combined.

On May 9, 2008 USC received and opened two bids for the subject project. One bid was submitted by Monroe, the other by Tyler. Both bidders were responsive and responsible. Monroe was low bidder on the base and Tyler was low bidder on the base and alternate combined. [A copy of the bid tabulation is attached as Exhibit “B”]. In evaluating bids, USC determined that funds were sufficient to permit the award of the Base Bid scope of work only.

On May 14, 2008, USC posted a Notice of Award to Monroe. Subsequently, USC realized it failed to award in accordance with the Instructions to Bidders. On May 16, 2008, USC sent a letter to the CPOC requesting that he cancel the Notice of Award for administrative error on the part of the agency in accordance with the provisions of SC Regulation 19-445.2085(C)(7). [A copy of this letter is attached as Exhibit "C"]. On May 20, 2008, Tyler submitted a protest to the CPOC protesting USC's failure to follow the Instructions to Bidders in making an Award to Monroe.

### **DETERMINATION**

Instructions to Bidders are complementary with the General Conditions of the Contract for Construction and are designed to be used together with the Project Manual for competitively bid projects. The instructions are intended for use by bidders as well as owners and are binding on both bidders and the agencies. *See e.g. Protest of Cannon Associates Inc.; Appeal by Kingsmore Construction*, Case No. 2000-13. Section 5.4.2 of the Supplemental Instructions to Bidders on this project provides as follows:

**“5.4.2 EVALUATION OF BID ALTERNATES.** In order to establish a clear and definitive basis of award when the Bidding Documents include Bid Alternates, the following process shall be used.

**5.4.2.1** When, and only when Bid Alternates are included in the Bid Documents, the Apparent Low Bidder will be determined by combining each Bidder's Base Bid amount and the total amount for all Bid Alternates. The Bidder who bids the lowest total price for the Base Bid and Bid Alternates, shall be deemed the apparent low bidder.

**5.4.2.2** Provided that the Agency determines the Apparent Low Bidder to be both responsive and responsible, the Agency shall have the right to award a contract to the Apparent Low Bidder based on any combination of Bid Alternates or no Alternates, unless otherwise specifically provided in the Bidding Documents.”

Based on these Instructions, Tyler was the “Apparent Low Bidder.” Moreover, USC found Tyler's bid to be responsive and Tyler to be responsible. Therefore, USC should have awarded the contract to Tyler rather than Monroe.

For the foregoing reason, Tyler's protest is granted and this matter is remanded to the University of South Carolina to make an award in accordance with the Supplemental Instructions to Bidders.

  
\_\_\_\_\_  
John St. C. White  
Chief Procurement Officer for Construction

  
\_\_\_\_\_  
Date

Columbia, South Carolina

STATEMENT OF THE RIGHT TO APPEAL

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**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

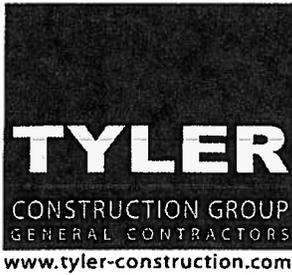
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Additional information regarding the protest process is available on the internet at the following web site:  
[www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

**FILE BY CLOSE OF BUSINESS:** Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

**FILING FEE:** Pursuant to Proviso 66.1 of the 2005 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003). Copies of the Panel's decisions are available at <http://www.procurementlaw.sc.gov>.



5/20/2008

Re: Byrnes Center Fourth Floor Renovation  
H27-1773

Attn: Linda Jackson  
USC ; Construction and Planning  
743 Greene St.  
Columbia, SC 29208

Dear Linda:

We protest the award of the this project to Monroe Construction based on supplemental Instruction to Bidders 5.4.2.1. of the OSE-201 Manuel for the evaluation of bid alternates.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles P. Tyler".

Charles P. Tyler  
**President**

Cc: protest-ose@mmo.sc.gov

THIS IS CERTIFIED TO BE A TRUE COPY



Byrnes Center Fourth Floor Renovation  
 Bids Due @10:00am on Friday, May 9, 2008  
 743 Greene Street, Columbia, SC 29208 Conference Room #63

BIDDER	BID SEC BOND	ADD ACK'D #1 & #2	Subcontractors	ALTY#1	BASE BID	TOTAL
Accent Contracting	NO BID		Interior Walls & Ceiling HVAC Electrical			
Boyskin Contracting	NO BID		Interior Walls & Ceiling HVAC Electrical			
Carolina Wrecking	NO BID		Interior Walls & Ceiling HVAC Electrical			
First Class Construction	NO BID		Interior Walls & Ceiling HVAC Electrical			
Keal Construction	NO BID		Interior Walls & Ceiling HVAC Electrical			

BIDS OPENED BY: *Shirley Jackson*  
 WITNESSED BY: *[Signature]*

1092  
 NOI Wood@430  
 14/MAY/08

THIS IS CERTIFIED TO BE A TRUE COPY



Brynes Center Fourth Floor Renovation  
 Bids Due @10:00am on Friday, May 9, 2008  
 743 Greene Street, Columbia, SC 29208 Conference Room #63

BIDDER	BID SEC BOND	ADD ACKD #1 & #2	Subcontractors	ALT#1	BASE BID	TOTAL
Monroe Construction	✓	✓		417500	4393,100.00	415,610
Precision Walls, Inc.	NO BID		Interior Walls & Ceiling HVAC Electrical	HESTER, JARY WAL WOPACKS CLAWMINGS, ELEC.		
Preferred Construction	NO BID		Interior Walls & Ceiling HVAC Electrical			
THS Constructors, Inc.	NO BID		Interior Walls & Ceiling HVAC Electrical			
Tyler Construction	✓	✓	PRECISION WALLS W.B. THOMASSON ENERGY PRO	412,000.00	401,000.00	413,000

BIDS OPENED BY: *David Jackson*  
 WITNESSED BY: *[Signature]*

RECEIVED

MAY 16 2008

OFFICE OF STATE ENGINEER



EXH. C

May 16, 2008

John White, State Engineer  
State Engineer's Office  
1201 Main Street, Suite 601  
Columbia, South Carolina 29201

Subject: Request for Cancellation of Notice of Award  
Byrnes 4<sup>th</sup> Floor Renovation  
USC Project CP000238411

Dear John:

In accordance with State Regulation 19-445.2085.C I respectfully request the cancellation of a Notice of Intent to Award posted in favor of Monroe Construction Company, LLC on May 14, 2008. The basis for this request is subparagraph (7), administrative error on the part of the agency. The circumstances of this error are as follows:

1. On May 9, 2008 USC received and opened two bids for the subject project. One bid was submitted by Monroe Construction Company and the other by Tyler Construction.
2. The Bid Form required bidders submit bids on a Base Bid and one Bid Alternate.
3. Both bids were found to be responsive and responsible.
4. Monroe Construction's Base Bid was lower than that of Tyler Construction.
5. The total bid (Base plus Alternate) submitted by Tyler Construction was lower than that of Monroe Construction.
6. The Supplemental Instructions to Bidders (Form 00201-OSE) included in the Bidding Documents was the 07/01 edition, which requires that in cases where bid alternates are included, the award shall be made to the responsive and responsible bidder submitting the lowest bid for the Base and all Alternates combined. In this case, that bidder was Tyler Construction.
7. In evaluating bids the University determined that funds were sufficient to permit the award of the Base Bid scope of work only.
8. The award as posted considered only the Base Bid amounts, not the Total Bid amounts as required by the Bidding Documents.

We regret that this error occurred and that bidders were inadvertently misled as to the true low bidder for this project. The staff members associated with this event have been counseled about the need to review all bidding documents to ensure full compliance with all aspects of the bid and award process as defined in the bidding documents before making an award. We hope that the ongoing transition to the 2008 bidding documents will eliminate the confusion that led to this unfortunate error. We wish to proceed with this contract as soon possible and would appreciate your earliest possible attention to this request.

If you have any questions or would like to see any of the project documents, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael M. Thomas". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael M. Thomas, PE, CBO  
Interim Director of Campus Planning and Construction  
University of South Carolina